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No. 82-158

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DONALD W. WYRICK,
Warden, Missouri State Penitentiary,
Petitioner,

v.

EDWARD FIELDS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

On September 25, 1974, Edward Fields, a soldier, was arrested, given his Miranda Warnings, and charged with rape. Fields thereupon consulted with privately retained and military counsel, and consented to a polygraph examination. Fields, on recognizance bond, appeared for the polygraph examination without counsel, stating that counsel would not be present; furthermore, he stated that he had consulted with this attorney concerning the polygraph and did not want his attorney present. Immediately prior to the polygraph Fields was again fully advised of his constitutional rights and signed a written consent document which also informed him of his rights. In addition, Fields was told that he could stop answering questions at any time or speak to a lawyer. Fields' answers to one or more of the examiner's questions indicated deceit in a discussion with the polygraph examiner of the deceitful responses ensued. Fields then made a statement which was used against him at trial.

1. Whether the Eighth Circuit erred in holding that Fields' statement was involuntary because the polygraph examiner failed to reapprise Fields of his constitutional rights after his deceitful responses were given, but before any further discussions of the responses ensued.

2. Whether, given the background, experience and conduct of Fields, and considering the particular facts and circumstances surrounding this case, he knowingly and intelligently relinquished his right to counsel.

PARTIES

In the Eighth Circuit Court of Appeals, the parties were: Edward Fields, petitioner-appellant, and Donald W. Wyrick, respondent-appellee.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Donald W. Wyrick, Warden, Missouri State Penitentiary, respectfully requests that a writ of certiorari issue to review the final order of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion from which this petition flows was handed down by the United States Court of Appeals for the Eighth Circuit on April 23, 1982, in the case styled: *Edward Fields,* appellant v. *Donald Wyrick,* appellee, No. 81-1245. To the best knowledge of petitioner, this opinion has yet to be published. A copy of the Eighth Circuit's opinion is reprinted as "Appendix A."

The Eighth Circuit opinion noted above followed an appeal taken from an order issued by United States District Court Judge Edward L. Filippine, United States District Court, Eastern District, Eastern Division of Missouri. That order was issued on February 13, 1981, and denied Fields' petition for writ of habeas corpus for the reasons stated in the "Report and Recommendation" of United States Magistrate William Bahn, which was issued on December 16, 1980. To the best knowledge of petitioner, neither the order of Judge Filippine nor the "Report and Recommendation" of the United States Magistrate have been published. Judge Filippine's order is reprinted as "Appendix B" and the "Report and Recommendation" of the Magistrate is reprinted as "Appendix C."

On May 28, 1982, the Eighth Circuit denied petitioner's petition for rehearing en banc. That order is reprinted as "Appendix D."

JURISDICTIONAL STATEMENT

28 U.S.C. Section 1254(1) states that cases in the Courts of Appeals may be reviewed by this Court:

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28 U.S.C. Section 2101(c) states that:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . ."

The Eighth Circuit's order denying Donald Wyrick's petition for rehearing en banc was issued on May 28, 1982.

Therefore, the final judgment of the Eighth Circuit is properly sought to be reviewed by a request of certiorari to that court and is made within 90 days from May 28, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fifth Amendment, reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Sixth Amendment, reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Respondent, Edward Fields, formerly a soldier stationed at Fort Leonard Wood, Missouri, was charged with raping a Waynesville, Missouri, woman on September 21,

1974. He was convicted by a jury on March 13, 1975, and was sentenced to twenty-five years imprisonment. His conviction was affirmed on appeal. *State* v. *Fields*, 538 S.W.2d 348 (Mo.App., Spr.D. 1976).

Fields subsequently filed three successive motions to set aside his conviction under Rule 27.26 of the Missouri Rules of Criminal Procedure. These motions were denied. *Fields* v. *State*, 596 S.W.2d 776 (Mo.App., S.D. 1980); *Fields* v. *State*, 572 S.W.2d 477 (Mo. 1978). Fields then sought a writ of habeas corpus, citing various grounds allegedly justifying relief. This petition concerns Fields' contention that the trial court erroneously admitted testimony regarding his "involuntary confession." The Eighth Circuit's opinion which is the subject of this petition found that Fields' confession was involuntary.

The facts which gave rise to Fields' 1975 rape conviction were as follows: On March 10, 1975, Fields was charged by information with raping Mrs. Nora Mitchell in Waynesville, Missouri, on September 21, 1974. Fields filed a pretrial motion to suppress the testimony of state's witnesses Charles Fann, Jesse Merl Bourne, and James E. Cole, concerning any statements made by Fields relating to the rape. Thereafter, a hearing was held on petitioner's motion to suppress on March 12, 1975. Fields' trial counsel and the prosecuting attorney stipulated at the hearing that Fields had requested a polygraph examination in connection with the rape charged against him.

The examination was administered on December 4, 1974, by Jesse Merl Bourne, a government agent with the Office of Criminal Investigation Division (C.I.D.) at Fort Leonard Wood where Fields was stationed in the Army. Although Fields had obtained counsel when he requested the polygraph examination, his counsel was not present with him when the examination was administered. Fields' decision to take the polygraph examination was made after

he discussed the matter fully with his attorney. At the motion to suppress hearing, counsel stipulated that *Miranda* warnings were given to Fields orally before the polygraph examination, and that he consented in writing to the examination.

Fields and the state presented conflicting evidence concerning what happened at the C.I.D. office on the day of the polygraph examination, but the following facts are uncontested. The examination began at approximately 9:00 a.m. and focused on five questions relating to Field's activity in Waynesville on the day of the crime. Fields answers to one or more of these questions indicated deceit and, the examiner, Bourne, discussed the answers with Fields. At that time, Fields made a statement which was used against him at trial. When the examination was completed, at approximately 11:00 a.m., Bourne gave the results to Charles Fann, also an agent with the C.I.D. office at Fort Leonard Wood. Fields was again given his *Miranda* rights and was then questioned by Waynesville Chief of Police, James E. Cole, in the presence of Agent Fann.

The evidence presented by the state at the motion to suppress hearing indicated that Fields was given his Miranda rights before the polygraph examination, and that he signed the polygraph examination statement of consent containing written documentation of the *Miranda* warnings. In addition, Fields was informed of his rights under the Uniform Code of Military Justice and the Eighth Amendment. He was also read the following detailed statement of his "rights":

> " 'Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you dur-

> ing the questioning. This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate. Do you want a lawyer at this time? Defendant answered, "No." ' "

State v. *Fields*, 538 S.W.2d 348, 350 n.1 (Mo.App., Spr. 1976).

At the end of the polygraph examination, Fields was asked if he wished to speak to Fann and Cole about the crime to which petitioner responded affirmatively. Bourne testified that Fields had not been reluctant to discuss the matter further. Fann testified that Fields was again given his *Miranda* warnings before talking to Chief of Police Cole. Fann indicated that Fields definitely understood the warnings and was willing to talk about this matter. Chief Cole did not testify at the hearing, but counsel stipulated that Cole would have testified that he gave Fields the *Miranda* warnings in the presence of Agent Fann before he questioned him again.

The statement which is the subject of this petition and which the Eighth Circuit found to be involuntary was the statement by Fields to Agent Bourn made during their discussion of Fields' deceitful responses given during the course of the polygraph examination. That statement was used against Fields at trial, and it is from the Eighth Circuit's opinion holding that the statement was involuntarily made, that petitioner seeks this Court's review.

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Eighth Circuit Court of Appeals' opinion issued on April 23, 1982, expands the rights guaranteed an accused during interrogation under the Fifth and Sixth Amendments to the United States Constitution to an extent beyond this Court's intent as evidenced by the decisional law of this Court. The Eighth Circuit has extended Fifth and Sixth Amendment protection beyond that expressly limited by this Court in its recent decision in *Edwards* v. *Arizona*, ____ U.S. ____, 101 S.Ct. 1880, ____ L.Ed.2d ____ (1981). Moreover, the Eighth Circuit's opinion in *Fields* v. *Wyrick*, No. 81-1245 (April 23, 1982), conflicts with a previous Eighth Circuit opinion in *United States* v. *Little Bear*, 583 F.2d 411 (8th Cir. 1978), and a Ninth Circuit opinion in *Keiper* v. *Cupp*, 509 F.2d 238 (9th Cir. 1975).

In *Edwards* v. *Arizona*, *supra*, this Court reaffirmed the standard for waiver of a constitutional right stating "that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.'" *Edwards* v. *Arizona*, *supra*, 101 S.Ct. at 1883-1884, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Under the facts of the instant case, Fields waived his right to have counsel present at the interrogation in accordance with this standard.

While both *Edwards*, *supra*, and the instant case revolve around the invocation of the right to counsel during interrogation, the cases are factually dissimilar, and be-

cause of this factual dissimilarity warrant different results. In *Edwards* the accused was given his constitutional rights after arrest and invoked his right to counsel. The very next day the accused, while incarcerated, was subjected to interrogation by law enforcement authorities even though he had the previous day invoked his right not to speak withut counsel being present. Counsel was not made available to the accused, but he was reapprised of his *Miranda* rights and apparently agreed to talk to the authorities. This Court found that the accused did not knowingly and intelligently waive his right to counsel.

In the instant case, Fields, the accused, already had retained private counsel and had consulted with military counsel before he *requested* the polygraph (interrogation). Prior to that interrogation, Fields clearly waived his right to counsel[1] and subsequently made a statement which was used against him at trial. It should be noted that Fields was clearly advised that he could stop answering questions at any time or speak to a lawyer even if he signed the waiver. See *Fields, supra, Ross, J.*, dissenting, slip opinion at p. 16. Thus, in *Edwards* the incarcerated accused, unrepresented by counsel invoked his right to have counsel present at the interrogation. Counsel was never made available to him. In the instant case, Fields, the accused, was already represented by counsel at the time the polygraph test was administered, but elected not to have counsel present at the interrogation as he had already discussed the polygraph (interrogation) with his attorney. In short, the accused in *Edwards,* although he invoked his right to counsel, never had a chance to discuss his interrogation with counsel, while on the other hand, in *Fields,* the

[1]Even the Eighth Circuit agreed, but drew a fine line between waiver of counsel for the purposes of the polygraph and waiver of counsel for non-polygraph interrogation. See *Fields, supra,* slip opinion at p. 10.

accused, already having obtained counsel, made the decision, with the benefit of counsel's advice, to subject himself to interrogation absent counsel's presence.

In examining the fact of the instant case this Court should bear in mind that Fields was given the full warnings concerning his constitutional rights at least twice before he made his statement. When Fields was originally arrested on September 25, 1974, he was given Miranda warnings and admitted at his suppression hearing that he understood the meaning of those warnings when he said "I understand it to be that I didn't have to make any statements, do anything without my counsel being present." *Fields, supra,* Ross, J., dissenting, p. 16. As stated previously, Fields was again fully apprised of his rights on the day the polygraph examination was administered. It should also be noted that Fields was reapprised of his rights after making his statement to agent Borne, but before speaking with Chief of Police Cole and agent Fann.

Thus, the evidence clearly shows that Fields knew what his rights were and waived them. Nothing in the record supports the argument that Fields did not fully comprehend his rights and the consequences of any statement he might make. The Eighth Circuit has added yet another "hopp" through which law enforcement authorities must jump in order to utilize the tool of post-arrest interrogation. While petitioner appreciates the constitutinal rights afforded all citizens, those rights in no way contemplate apprisal *ad infinitum,* especially in the case where the accused shows that he fully understands his constitutional rights and is making a knowing and intelligent relinquishment of them.

It is clear from the Eighth Circuit's opinion in the instant case that the polygraph examiner had only two options available to him after Fields gave deceitful re-

sponses to the examiner's questions but before the discussion of those answers: (1) call in Fields' attorney (but Fields already had stated that he did not want his attorney present); or (2) give Fields yet another set of *Miranda* warnings (but Fields had already been exhaustively apprised of his rights at the inception of the polygraph examination). Respondent finds it difficult to understand how, under the circumstances, one more recitation of *Miranda* warnings would prove a knowing and intelligent waiver if the prior *Miranda* warnings failed to do the same.

The distinction the Eighth Circuit draws between interrogation undertaken during which the polygraph was attached to respondent and the questioning following the polygraph is an artificial and hypertechnical one. Quite clearly the substance of the entire transaction was interrogation to which Fields clearly consented as indicated by his waiver.

Petitioner has difficulty in reconciling Fields with another Eighth Circuit opinion rendered in *United States* v. *Little Bear, supra.* In *Little Bear* the defendant was questioned by BIA agents regarding the death of her husband. She was advised of her rights and signed a waiver form. Two months later the defendant consented to the taking of a polygraph examination. Prior to the taking of the polygraph, the defendant signed a "consent to be interviewed with polygraph" form. She was also advised of her constitutional rights and signed a form which listed those rights. During the polygraph examination the defendant was asked if she had stabbed her husband, to which she responded in the affirmative. She then stated that she wanted to talk about it. The polygraph apparatus was subsequently removed from her and thereafter she signed a written confession. However, she was not reminded of her right to

an attorney or her right to remain silent after the polygraph apparatus was removed and before she gave her written statement. The Eighth Circuit held that the defendant's written statement given subsequent to the removal of the polygraph apparatus and without a further reminder of her constitutional rights, constituted a voluntary confession. It is interesting to note that the Eighth Circuit reached this conclusion even though it recognized that the record indicated that the defendant was an unsophisticated, uncounseled and emotionally distraught Indian woman.

The Eighth Circuit attempts to distinguish *Little Bear* from the instant case on the grounds that Little Bear had not retained counsel when she went to take the polygraph. The court reasoned that it was required to determine whether the agent's procedure had deprived Little Bear of a previously asserted right to deal with authorities through counsel. *Fields, supra,* slip opinion, pp. 13-14 n.13. Although Fields clearly asserted his right to deal with authorities through counsel by retaining private counsel, his statements made the day the polygraph was administered relative to his desire not to have counsel present, combined with his stated understanding of his constitutional rights clearly establishes a relinquishment or abandonment of a known constitutional right. Even the Eighth Circuit agreed that, at least for the purposes of the polygraph examination, Fields waived his right to have counsel present.

The Eighth Circuit further distinguishes *Little Bear* from the instant case on the grounds that Little Bear expressly consented to an interview that was not confined to questions propounded as a part of the polygraph examination. However, in the instant case Fields was apprised as follows:

> "If you are now going to *discuss* the offense under investigation, which is rape, with or without a lawyer present, *you have a right to stop answering questions at any time or speak to a lawyer before answering questions further,* even if you sign a waiver certificate. . . ."

State v. *Fields*, 538 S.W.2d 348, 350 n.1 (Mo.App., S.D. 1976) (emphasis added)

It is interesting to note that the Eighth Circuit's opinion in *Little Bear* relied on the reasoning employed by the Ninth Circuit in *Keiper* v. *Cupp*, 509 F.2d 238 (9th Cir. 1975), a case which is factually more similar to the instant case. In *Keiper*, the Ninth Circuit rejected the petitioner's claim that he should have been given an additional *Miranda* warning after a polygraph examination was administered, but before the interrogation resulting in a confession. The court stated:

> "We find no authority to support appellant's contention that he should have been given another *Miranda* warning after being told of the 'gross deceptive patterns' revealed in his polygraph test. He does not dispute the fact that he was read his rights before the test began and signed a written waiver of rights form. However, he argues that the waiver applied only to the test, that the waiver of his rights terminated when the test ended, and that before questioning him about discrepancies in his story, he again should have been advised of his rights. Because appellant had been advised many times of his rights prior to, and at the time of the polygraph test, there is no reason to believe that he was not fully aware of those rights during the crucial period when his final story was taped. . . ."

Id., 509 F.2d at 241.

The reasoning expressed in *Keiper* and *Little Bear* appears to be generally followed. See *People* v. *Barreto*, 256 Cal.App.2d 392, 64 Cal.Rpt. 211 (1967); *State* v. *Henry*, 352 So.2d 643 (La. 1977); *Turner* v. *State*, 250 N.W.2d 706 (Wis. 1977).

In summary, *Little Bear*, *Keiper*, and the apparent weight of authority would seem to support that, under the totality of the circumstances, Fields' waiver and confession was voluntary, knowing, and intelligent as he was clearly advised of his rights on numerous occasions prior to his confession. Moreover, nothing in *Edwards* v. *Arizona*, *supra*, a case clearly distinguishable from the instant case on its facts and the legal principles involved, sanctions the result reached in the Eighth Circuit's opinion in the instant case. Consequently, respondent believes that certiorari should be granted in order to delineate the standard for waiving the right to counsel under the circumstances where counsel has been retained but the accused expresses the desire not to deal with the authorities through counsel.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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